United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

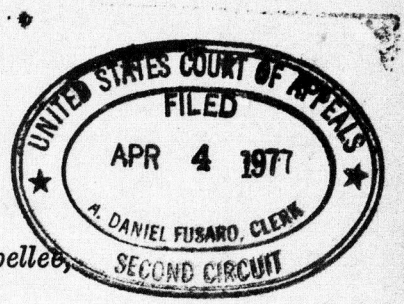
original

76-6150

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

—v.—

LOCAL 14 INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 15 INTERNATIONAL UNION OF OPERATING ENGINEERS, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK CITY, and ALLIED BUILDING METAL INDUSTRIES,
Defendants-Appellants,

and

THE IRON LEAGUE OF NEW YORK CITY, INC., THE CONSTRUCTION EQUIPMENT RENTAL ASSOCIATION, BUILDING CONTRACTORS' AND MASON BUILDERS ASSOCIATION, THE CEMENT LEAGUE, STONE SETTING CONTRACTORS' ASSOCIATION, RIGGING CONTRACTORS ASSOCIATION, CONTRACTING PLASTERERS ASSOCIATION and EQUIPMENT SHOP EMPLOYERS,
Defendants,

and

JOSEPH ERSKINE and LAWRENCE MORRISON,
Appellants.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

B 8/5

PETITION OF DEFENDANT-APPELLANT, THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., FOR REHEARING

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PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

By decision issued March 21st, 1977, this Court determined, in part:

1. This Court did not have to pass upon the issue that the District Court's failure to hold a hearing for relief, constituted a violation of the Contractors' Associations due process rights. The basis for this Court's finding, is, that such failure of the District Court was improper in that it violated a specific agreement among the parties. This Court's decision immediately thereafter, while not identifying the aforesaid "specific agreement" among the parties, did refer to a Stipulation included in the Pre-Trial Order, between the GCA and the Equal Employment Opportunity Commission (EEOC) that the GCA would have "a full opportunity to offer proof, on the issue of relief."

2. That the matter be remanded to the District Judge to "conduct a full evidentiary hearing concerning the practices and procedures in the construction industry and the effect of his (sic) order will have not only upon the defendant unions but also, defendant contractors associations and their members."

3. This Court, in its remand also found that the District Court Judge "should find particularly what effect a provision exclusively limiting the employers' right to hire those sent from the hiring hall would have on the industry in comparison with present practices."

PRELIMINARY STATEMENT

This Petition for Rehearing is filed pursuant to Federal Rules of Appellate Procedure, Rule 40(a). Rehearing is sought to bring before the Court the issues hereinafter set forth:

(a) The GCA is not a necessary party for the purposes of relief under Rule 19(a) of the Federal Rules of Civil Procedure, Point I;

(b) The GCA Members are not parties to the action and were never subject to the jurisdiction of the District Court and were not parties to the Pre-Trial Consent Order Stipulation between the EEOC and GCA, Point II;

(c) The District Court has no Authority to impose a hiring hall on the Members of the GCA, Point III.

We respectfully submit that this Court should grant the Petition for Rehearing and make a determination as to whether or not the GCA is a necessary party for the purposes of relief. If GCA is not a necessary party for such purposes, it should not be required to bear the expense and burden of what would appear to be a very lengthy evidentiary hearing on the issues of relief.

ARGUMENT

POINT I

THE GCA IS NOT A NECESSARY PARTY FOR THE PURPOSES OF RELIEF UNDER RULE 19(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The GCA is a Not-For-Profit Corporation created and existing under the laws of the State of New York. The New York State Not-For-Profit Corporation Law, Section 517 "Liabilities of Members" states, in part, as follows:

> "a. The Members of a corporation shall not be personally liable for the debts, liabilities or obligation of the Corporation."

There is nothing in the record to establish that the GCA is an Employer of Union Members within the jurisdiction of Locals 14 and 15 in the Construction Industry (in fact, GCA is not an employer of anyone whose work is such that it falls within a construction trade). Moreover, the GCA was made a party defendant in this action solely for the purposes of relief according to Rule 19(a) of the Federal Rules of Civil Procedure.

The Complaint and Pre-Trial Consent Order which sets forth therein the Stipulation between the Plaintiff and the GCA, evidences that no liability was asserted against the GCA herein for discriminatory employment practices (See Joint Appendix, Volume 1, Pleadings, page 11, paragraph 14 therein and the Pre-Trial Consent Order signed on September 19, 1974 Joint Appendix, Volume I, Pleadings, page 43).

Further, there is only one paragraph in the Order and Judgement filed September 1, 1976 (See Joint Appendix, Volume I, Pleadings, Pages 239 et seq.) which is made up of thirty-two pages, which refers to the GCA. Said Paragraph is Paragraph 4 therein and consists, in substance, of a permanent injunction against the GCA and its Members, and all persons in active concert or participation with them, from engaging in any act, or practice, etc. which has the purpose, or effect of discriminating in recruitment of membership in the Unions, advancement, compensation, etc. on the basis of race, color or national origin.

By its own admission, evidenced by the Complaint and Pre-Trial Consent Order, referenced supra, the Plaintiff (1) incontrovertibly established that the GCA was not accused of any discriminatory employment practices, etc. based upon race, creed or national origin and (2) that the only relief requested by Plaintiff and ordered by the District Court, as it pertained to the GCA, was for the GCA not to engage in such discriminatory practices in the future even though by the admissions set forth in the Complaint and Pre-Trial Consent Order, no accusation existed, that the GCA had engaged in such practices in the past. Moreover, in the same Paragraph 4, of the Final Order and Judgment, supra, in the last sentence thereof, it is set forth that the provisions of Paragraph 4 did not constitute a finding that the GCA and other contractors' associations, had, in the past, engaged in prohibitive discriminatory acts or practices referred to in such Order.

Therefore, (a) since there is no contention and/or proof the GCA is an Employer; (b) admittedly the GCA has not been accused of any discriminatory employment practices based on race, creed, or national origin and; (c) there was no relief in the Final Order and Judgment requested by Plaintiff and or directed by the Court which the GCA was to provide (Paragraph 4 of the Final Order and Judgment provides only for a permanent injunction to be imposed upon the GCA, and also upon its individual members, who are not parties in the action) it is respectfully submitted that the GCA is not a necessary and/or proper party for relief, in the action and its individual members cannot be bound by an Order in the action since they were not parties therein, see POINT II below.

It is of great significance that this Court found (See this Court's decision of March 21, 1977, The Grant of Relief, second unnumbered paragraph therein) that the Order appealed from adopted "...almost in toto the proposed order of the EEOC...". Further, at the July 26, 1976 proceeding before Judge Tenney, the record will establish (See Joint Appendix, Vol. 1, Pleadings Transcript of Appearance of Counsel before Judge Tenney, July 26, 1976, Pages 128, et seq.) the only modification Judge Tenney made to said Paragraph 4 of the EEOC proposed order, was the addition of the last sentence therein, which sentence, in substance, recited that Paragraph 4 did not constitute a finding that the GCA, among others, had in the past, engaged in prohibitive discriminatory acts or practices referred to in such Order.

Thus, there can be no denial that the content of the Order signed by Judge Tenney was prepared by the EEOC and evidenced the complete relief the EEOC sought in this action, from the GCA. The content of the District Court Order establishes and incontrovertibly constitutes an admission of the EEOC that no relief was to be provided by the GCA. It is very clear that the allegation in the Complaint that the GCA was required as a necessary party defendant for complete relief, is not supported by the record and the EEOC, and by its course of conduct in the preparation of the content of the District Court Order, has admitted the GCA is not a necessary or a proper party for relief herein.

POINT II

THE GCA MEMBERS ARE NOT PARTIES TO THE ACTION AND WERE NEVER SUBJECT TO THE JURISDICTION OF THE DISTRICT COURT AND WERE NOT PARTIES TO THE PRE-TRIAL CONSENT ORDER STIPULATION BETWEEN THE EEOC AND GCA

Nowhere in this action is there anything in the record and/or in the proof submitted, to establish that the members of the GCA were parties to the action. Further, the members of the GCA, not being parties to the action, it cannot be reasonably contended said members were parties to the EEOC-GCA Pre-Trial Consent Order Stipulation. Moreover, it is respectfully submitted, the decision of this Court may be construed as permitting the District Court to issue an Order purportedly binding upon the members of the GCA notwithstanding said members were not parties to the action. It is therefore further respectfully submitted that this Court clarify or strike from its decision any recital directing or authorizing the District Court issuing any order binding upon the members of the GCA.

As stated above in POINT I herein, the members of GCA, under the New York State, Not-For-Profit Corporation Law". . .shall not be personally liable for the debts, liabilities or obligations of the Corporation. . .".

Also, there has been no finding nor proof offered herein, that the GCA has authority to appear or represent its members herein. Moreover, there has been no finding or proof, other than unsupported allegations of the EEOC, that the GCA had unrestricted authority to act or and on behalf of its Members with respect to collective bargaining agreements (the contrary is the fact).

While the members of the GCA were not parties to the action, they were included in fourteen (14) provisions of the District Court Order, viz., paragraphs 20, 24, 31, 34a, 37a &b, 38, 39b, 44a, 46, 48, 56a & c and 59.

There can be no finding that the District Court ever had any jurisdiction over the members of the GCA in this action. A decision of this Court reciting in its present form that the District Judge is to conduct a full evidentiary hearing concerning the practices and procedures of the construction industry and the effect the District Court's Order will have upon the defendant contractors' associations and their members, may be construed as authorizing the District Court, after such an evidentiary hearing, to issue an Order binding upon members of the GCA over whom the District Court does not and never had jurisdiction. It is again, respectfully submitted that this would constitute a violation of the rights of the GCA members and more specifically, a deprivation of such rights without due process of law granted by the Constitution of the United States to all persons, in a matter where the members of the GCA were not made parties to the action for any purpose.

It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights in personam of parties not brought before it by due process of law, Pennoyer v. Neff, 95 U.S. 714, 24 L.ed. 565 and that "proceedings

in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction does not constitute due process of law" Ibid p. 565.

POINT III

THE DISTRICT COURT HAS NO AUTHORITY TO IMPOSE A HIRING HALL ON THE MEMBERS OF THE GCA

The decision of this Court further provides, in part, that the District Court Judge "should find particularly what effect a provision exclusively limiting the employers' right to hire those sent from the hiring hall would have on the Industry by comparison with present practices." It is again respectfully submitted that the District Court lacks such authority.

The collective bargaining agreements are between the Unions herein and the employing contractors who are members of GCA (See Joint Appendix Volume II: Exhibits 40-49 and 54 Pages 121 through 206, 278 through 335 and Pages 347 through 434) and do not contain any provision for a "Hiring Hall" as a source of recruiting or supplying needed personnel. In fact, there is no provision in such agreements concerning the method of hiring.

Any imposition upon the members of the GCA, by the District Court, to exclusively use a Hiring Hall as their sole source of employment, would amount to the foisting upon the GCA members a substantive provision to the existing collective bargaining

agreements between the unions and the GCA members, which provision is properly an item to be bargained upon, between the said parties. Such action by the Court would be in conflict with established Federal Policy as evidenced by H. K. Porter Company against NLRB, 397 US 99. Such policy is that the role of the courts is to supervise the procedures of bargaining and not to regulate the substantive aspect of bargaining.

In all of the cases which deal with allowable Court interference with collective bargaining agreements, underlining such allowable interferences, is a finding of some existing discriminatory content in the existing collective bargaining agreements. No such finding can exist herein. Nowhere in the record is there the faintest allegation and/or proof, of any discriminatory employment practices based upon race, creed or national origin, attributable to the members of the GCA. Again, this Court's attention is directed to the fact that the District Court hever had nor now has jurisdiction over the members of the GCA.

The United States Supreme Court has acknowledged that Title VII Remedies are modeled upon Remedial Sections of the National Labor Relations Act. See Frank against Bowman Transport Co., 47 L. Ed. 2d 444.

It may be inferred from the decision of this Court that the District Court contrary to the decision of H. K. Porter, supra, has the authority to impose a hiring hall on the members of the GCA, and would be in conflict with the principles in Frank v. Bowman, supra.

Title VII remedies are modeled pursuant to remedial sections of the NLRA.

It is therefore respectfully submitted that this Court grant a rehearing on the above issues and to reverse, or clarify its decision deleting therefrom, any recital directing or authorizing the District Court to issue an order compelling the GCA members to be bound to use a hiring hall and expressly forbidding the making of any order purporting to bind the individual members of the GCA.

CONCLUSION

FOR THE REASONS STATED ABOVE, WE URGE THIS COURT GRANT REHEARING TO VACATE AND/OR CLARIFY THE ORDER OF MARCH 21, 1977 INSOFAR AS IT DETERMINED: (1) THAT THE GENERAL CONTRACTORS ASSOCIATION OF NEW YORK INC. (GCA) IS A NECESSARY OR PROPER PARTY FOR RELIEF HEREIN: (2)THAT THE MEMBERS OF GCA ARE PARTIES HEREIN AND (3) THE GCA MEMBERS ARE BOUND BY ANY ORDER OF THE DISTRICT COURT, INCLUDING, BUT NOT LIMITED TO AN ORDER WHICH WOULD IMPOSE UPON THE GCA MEMBERS A PROVISION EXCLUSIVELY LIMITING THE GCA MEMBERS' RIGHT TO HIRE ONLY THOSE SENT FROM THE HIRING HALL.

April 1, 1977

Respectfully Submitted,
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Attorneys for The General
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New York, Inc. -
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JAMES J. A. GALLAGHER,
MILES F. McDONALD,

Of Counsel.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

YVONNE BORNHOLZ, being duly sworn, deposes and says: that deponent is in the employ of SHEA GOULD CLIMENKO & CASEY, attorneys for Appellant General Contractors Association of New York, Inc. herein, is over 18 years of age, is not a party to this action and resides at 81 Chestnut Avenue, North Pelham, New York. On the 4th day of April, 1977, deponent served the within Petition of Defendant-Appellant, The General Contractors Association of New York, Inc., For Rehearing on the following:

Equal Employment Opportunity
Commission
Office of the General Counsel
2401 East Street, N.W.
Washington, D.C. 20506
Att: Mary-Helen Mautner

Harold R. Bassen, Esq.
Allied Building Metal Industries.
211 East 43rd Street
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Bonner, Thompson, Kaplan &
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900 Seventeenth Street, N.W.
Washington, D. C. 20006

Doran, Colleran, O'Hara, Pollio & Dunne, P.C.
1461 Franklin Avenue
Garden City, New York 11530

by depositing a true and correct copy of the same, properly enclosed in a postpaid wrapper in the official depository maintained and exclusively controlled by the United States Government at 330 Madison Avenue, New York, Nhw York 10017 that being the post office address of the attorneys for Appellant, General Contractors Association of New York, Inc., directed to said attorneys above-listed

at the abovementioned addresses designated by them for that purpose.

Yvonne Bornholz

YVONNE BORNHOLZ

Sworn to before me this

4th day of April, 1977

Ralph I. Beil

RALPH I. BEIL, Notary Public
State of New York, No. 31-4520762
Qualified in New York County
Certificate filed in New York County
Commission Expires March 30, 19 77